

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 547.

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ELLIOTT FREDERICK, TRUSTEE IN BANKRUPTCY OF  
THE ESTATE OF JOHN E. SCHMIDT, PETITIONER,

vs.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY OF  
PHILADELPHIA.

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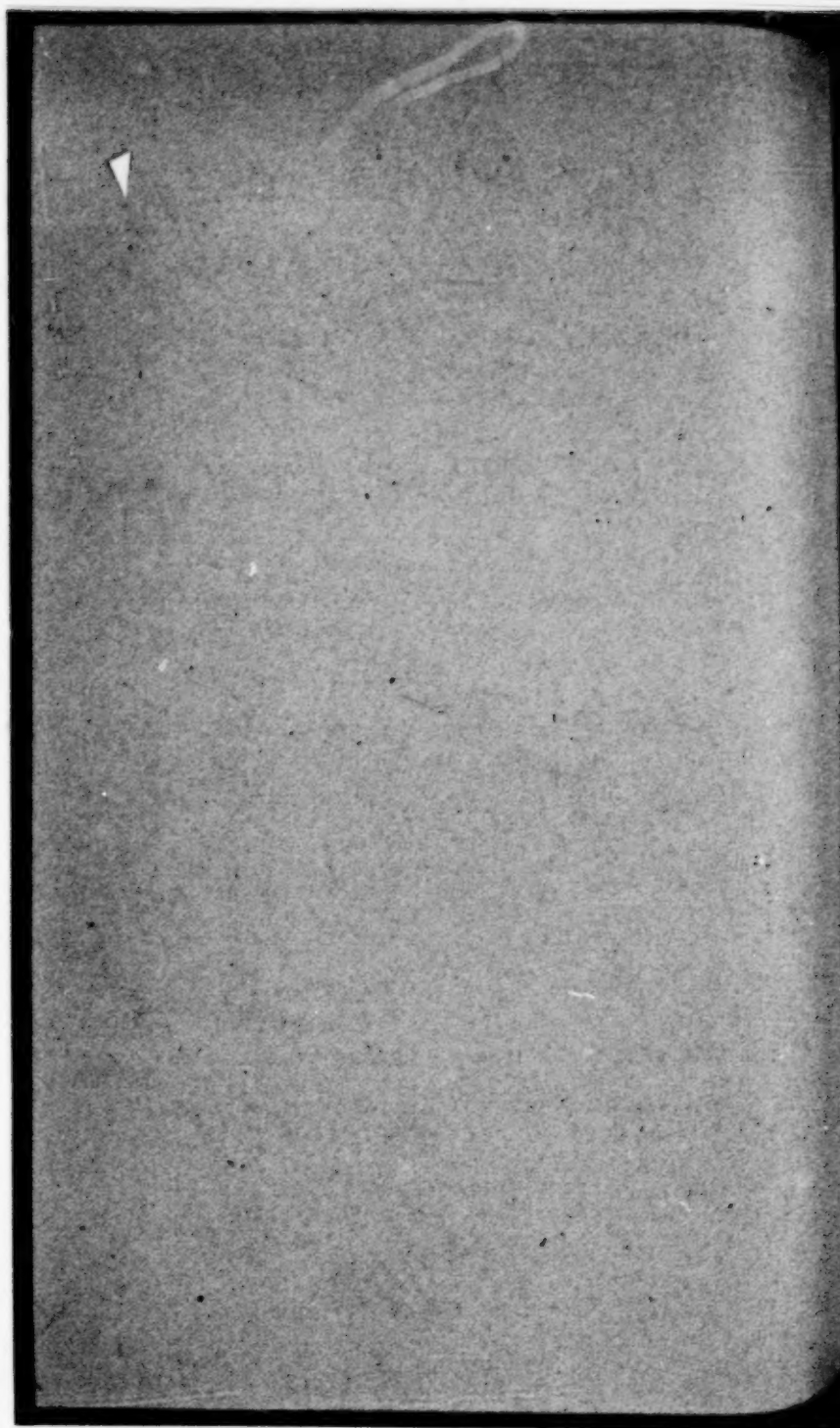
ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF THE STATE  
OF PENNSYLVANIA.

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WRITING FOR CERTIORARI FILED SEPTEMBER 12, 1923.

CERTIORARI AND RETURN FILED NOVEMBER 12, 1923.

(27,904)



(27,904)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

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ELLIOTT FREDERICK, TRUSTEE IN BANKRUPTCY OF  
THE ESTATE OF JOHN E. SCHMIDT, PETITIONER,

*vs.*

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY OF  
PHILADELPHIA.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE  
OF PENNSYLVANIA.

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In the Superior Court of Pennsylvania, Fifth District.

No. 25 of April Term, 1920.

ELLIOTT FREDERICK, Trustee in Bankruptcy of the Estate of John  
E. Schmidt, Appellant.

VERSUS

THE FIDELITY MUTUAL INSURANCE COMPANY OF PHILADELPHIA,  
a Corporation under the Laws of the State of Pennsylvania.

Certiorari to the Court of Common Pleas of Allegheny County, at  
No. 1188, July Term, 1915, Docket "D." Returnable the Fourth  
Monday of April, 1920, at Pittsburgh.

Form of Action, Assumpsit

*Docket Entries*

COMMONWEALTH OF PENNSYLVANIA,  
*County of Allegheny, ss:*

In the Court of Common Pleas of Allegheny County, Pennsylvania.

No. 1188, July Term, 1915, Docket "D."

ELLIOTT FREDERICK, Trustee in Bankruptcy of the Estate of John  
E. Schmitt,

VS.

FIDELITY MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA.

May 11, 1915, Summons in Assumpsit to 1st Monday June, 1915.  
Affidavit and Statement filed. May 21, 1915, Writ returned served  
May 13, 1915, on C. L. Harty or Harty, Asst. Cashier of Defendant  
Company. June 18, 1915, Demurrer filed. March 29, 1917,  
Amended statement presented in open Court and ordered filed. March  
29, 1917, Demurrer to amended statement filed. And now, July 12,  
1918, demurred to amended statement overruled and defendant given  
twenty days in which to file an affidavit of defense. July 26, 1918,  
Affidavit of defense filed. September 9, 1918, Plea and Præcipe for  
issue filed. October 8, 1918, Stipulation as to evidence and waiving  
jury trial filed. December 31, 1918, Findings of fact and conclu-  
sions of law filed. Eo die Judgment entered in favor of defendant.

Opinion filed. January 9, 1919, Exceptions ex parte plaintiff  
to findings of fact and conclusions of law presented in open  
Court and ordered filed. May 9, 1919, Exceptions overruled  
and a new trial refused. Eo die exception noted and bill sealed.

May 29, 1919, Judgment for Defendant as per order of Court. June 2, 1919, Plaintiff appeals to Superior Court. *Ex die certiorari* filed February 20, 1920, Stipulation filed.

From the Record.

[SEAL.]

JOHN VOSET,  
*Prothonotary.*

\* \* \* \* \*

8

*Findings of Fact.*

Filed December 31, 1918.

WASSON, J.,

This is an action in assumpsit brought to recover on a policy of life insurance, and was submitted for determination without the intervention of a jury. From the evidence produced we reach the following:

(1) The defendant on September 20, 1902, duly issued its policy of insurance No. 132,520 on the life of John E. Schmidt in the sum of \$1,000.00.

(2) The said policy is payable as follows:

"The Fidelity Mutual Life Insurance Company of Philadelphia, Penna., by this policy of insurance agrees to pay the sum of one thousand dollars at its head office in the City of Philadelphia upon surrender of the same properly receipted within sixty days after the acceptance of the due and satisfactory proof of the fact and cause of the death of John E. Schmidt, of Rochester, Beaver County, and State of Pennsylvania, (the insured under this policy) and said claim hereunder to his wife, Annie M. Schmidt, or if the insured survive the aforesaid beneficiary, to his administrators, executors or assigns of the insured, subject to all the requirements, privileges and provisions stated in the following pages \* \* \*"

(3) The said policy reserves the right on the part of the insured to change the beneficiary as follows:

9 "The insured, with the written approval of the President or Vice-President, may upon the surrender of this policy, change the beneficiary, or with such approval it may be assigned."

(4) On the 19th day of December, 1912, a petition in involuntary bankruptcy was filed against the said John E. Schmidt in the District Court of the United States for the Western District of Pennsylvania at No. 6572 in Bankruptcy, and on the 8th day of January following he was duly adjudged a bankrupt. On the 8th day of February, 1913, the plaintiff was elected trustee of said bankrupt, and duly qualified.

(5) The said policy of insurance was not included in the schedules which the said bankrupt was required to, and did, file in the bankruptcy proceedings.

(6) On the 4th day of April, 1913, the said John E. Schmidt died, and ther-upon proof of the fact and the cause of his death were duly made to, and accepted by, the defendant.

(7) On the 7th day of May, 1913, the defendant in good faith paid to Annie M. Schmidt, the beneficiary named in said policy, the sum of one thousand dollars, being the proceeds thereof, and received her receipt in full.

(8) The plaintiff had no knowledge of the issuance of said policy until about four months after the proceeds had been paid.

(9) On the day of the adjudication in bankruptcy, the said policy had a cash surrender value of \$322.00, payable to the insured.

(10) Neither at the time the proceeds of said policy were paid nor at any time prior thereto did the defendant have any knowledge of the adjudication in bankruptcy, nor did the plaintiff give the defendant any notice that he would claim the whole or any part of said policy.

10 (11) On the 15th day of April, 1914, the plaintiff, through his attorney, notified the defendant by letter that as trustee in bankruptcy of the estate of John E. Schmidt he would claim the cash surrender value of said policy as of the date of the adjudication in bankruptcy. The notice, however, contained no demand for payment.

### *Conclusions of Law.*

(1) The defendant, in good faith, without knowledge of the adjudication in bankruptcy and in the absence of notice of any adverse claim, paid the proceeds of the policy in strict accordance with the terms of its contract, and cannot again be required to make payment of the same or any part thereof.

(2) The adjudication in bankruptcy, in the absence of actual notice of an adverse claim, created no liability on the part of the defendant to the plaintiff.

(3) Judgment should be entered for the defendant.

### *Judgment.*

And now, December 31, 1918, in accordance with the foregoing findings of fact and conclusions of law, judgment is entered in favor of defendant.

The result here reached follows the decision of the United States Circuit Court of Appeals for the Third Circuit in the case of *Elliott Frederick, Trustee in Bankruptcy of the Estate of John E. Schmidt, a resident of the State of Pennsylvania, Plaintiff in Error and Below, vs. The Metropolitan Life Insurance Company of New York, a corporation and resident of the State of New York, 239 Federal, 125.*

The facts before us are substantially the same as in that case, in which judgment was entered in the lower court on the theory that the policy was exempt from the operation of the bankruptcy law by virtue of the provisions of the Act of Assembly of the Commonwealth of Pennsylvania.

In the Court above the judgment was sustained, not on the ground, specifically, however, that the policy was exempt under Pennsylvania enactment, but on the ground that it had in good faith and without notice of any adverse claim been paid to the duly designated beneficiary.

Bullington, J., who wrote the opinion, said:

"We are not here concerned with the duty or the failure, or the omission of the bankrupt in regard to this policy, or what might have been the right of the trustee to participate in the policy had timely notice been given and steps taken by him to secure the cash surrender value of the policy, before the same had been unwittingly paid by the company to the beneficiary. Nor are we concerned with any right of action of the trustee against the beneficiary who received the money. The sole question before us is as to the  
12 liability of the insurance company and whether after the money had once been paid in good faith to the designated and unrevoked beneficiary of the policy, any legal right is now vested in the plaintiff in this case to compel the present defendant to pay the money a second time. There certainly is no contract obligation on the insurance company to pay a second time. Be that contract the company contracted with the insured to pay the amount of the policy to a certain beneficiary. On the death of the insured, without revocation or change of beneficiary, there arose a contractual legal liability of the company to pay the amount of the policy to that beneficiary. As a sequence to such contractual legal liability the right to sue on the policy was vested in the beneficiary, and the contract provided for no other rights and obligations than those of the beneficiary and the company. When, therefore, the insured had died, the beneficiary had furnished due proof and made timely demand for the contracted sum, the company, 'without notice of any character as to any adverse claim thereto,' was not only justified, but contractually bound to pay the money to Mrs. Schmidt."

From this decision an appeal to the United States Supreme Court was sought, but refused.



It is not a distinction between the Metropolitan case and the case at bar to say that in one the demand was for the entire proceeds of the policy and in the other the demand was for both the cash surrender value and the entire proceeds. The same principle applies.

13     *Exceptions ex Parte Plaintiff to Findings of Fact, Conclusions of Law, and to Entry of Judgment and Motion for a New Trial.*

Filed January 9, 1919.

And now, comes plaintiff, by counsel, and excepts and objects to the findings of fact, conclusions of law and entry of judgment in the above stated case and moves for a new trial for reasons as follows:

First. The Court erred in its sixth finding of fact as follows:

"6. On the 7th day of May, 1913, the defendant, in good faith paid to Annie E. Schmidt, the beneficiary named in said policy, the sum of one thousand dollars, being the proceeds thereof, and received her receipt in full."

Second. The Court erred in its tenth finding of fact as follows:

"10. Neither at the time the proceeds of said policy were paid nor at any time prior thereto did defendant have any knowledge of the adjudication in bankruptcy, nor did the plaintiff give the defendant any notice that he would claim the whole or any part of said policy."

Third. The Court erred in its first conclusion of law as follows:

14     "1. The defendant, in good faith, without knowledge of the adjudication in bankruptcy and in the absence of notice of any adverse claim, paid the proceeds of the policy in accordance with the terms of its contract, and cannot again be required to make payment of the same or any part thereof."

Fourth. The Court erred in its second conclusion of law as follows:

"2. The adjudication in bankruptcy, in the absence of actual notice of an adverse claim, created no liability on the part of the defendant to the plaintiff."

Fifth. The Court erred in its third conclusion of law as follows:

"3. Judgment should be entered for the defendant."

Sixth. The Court erred in entering the following judgment:

"And now, December 31st, 1918, in accordance with the foregoing findings of facts and conclusions of law, judgment is entered in favor of defendant."

L. C. BARTON,  
*Of Attorneys for Plaintiff.*

And now, January 6th, 1919, the foregoing exceptions and motion for a new trial allowed to be filed.

HENRY G. WASSON,  
*Trial Judge.*

15

*Opinion.*

Filed May 9, 1919.

And now, May 9th, 1919, exceptions to the findings of fact, conclusions of law and entry of judgment are overruled and a new trial refused.

BY THE COURT.

*Exception.*

Filed May 9, 1919.

So the exception noted and bill sealed for plaintiff.

HENRY G. WASSON, [SEAL]  
*Judge.*

*Judgment.*

Filed December 31, 1918.

And now, December 31, 1918, in accordance with the foregoing findings of fact and conclusions of law, judgment is entered in favor of defendant.

Filed May 29, 1919.

To William B. Kirker, Esq.,  
*Prothonotary.*

Enter judgment for defendant as per order of Court.

RICHARDSON & ROGERS,  
*Attorneys for Defendant.*

May 29, 1919, judgment for defendants as per order of Court.

16

*Assignments of Error.*

First. The Court below erred in overruling plaintiff's first exception to the findings of fact and conclusions of law as follows. (Page 13)

"First. The Court erred in its sixth finding of fact as follows:

"6. On the 7th day of May, 1913, the defendant, in good faith paid to Annie E. Schmidt, the beneficiary named in said policy the sum of one thousand dollars, being the proceeds thereof, and received her receipt in full."

(Page 15:)

"And now, May 9th, 1919, exceptions to the findings of fact, conclusions of law and entry of judgment are overruled and a new trial is refused.

"BY THE COURT.

"To die exception noted and bill sealed.

"HENRY G. WASSON, [SEAL.]

"Judge."

Second. The Court below erred in overruling plaintiff's second exception to the findings of fact and conclusions of law as follows: (Page 13.)

"Second. The Court erred in its tenth finding of fact as follows:

"10. Neither at the time the proceeds of said policy were paid or at any time thereto did defendant have any knowledge of the liquidation in bankruptcy, nor did the plaintiff give the defendant any notice that he would claim the whole or any part of said policy.

(Page 15:)

"And now, May 9th, 1919, exceptions to the findings of fact, conclusions of law and entry of judgment are overruled and a new trial is refused.

"BY THE COURT.

"To die exception noted and bill sealed.

"HENRY G. WASSON, [SEAL.]

"Judge."

Third. The Court below erred in overruling plaintiff's third exception to the findings of fact and conclusions of law as follows (Page 13):

"Third. The Court erred in its first conclusion of law as follows:

"1. The defendant, in good faith, without knowledge of the liquidation in bankruptcy and in the absence of any adverse claim, paid the proceeds of the policy in accordance with the terms of its contract, and cannot again be required to make payment of the same or any part thereof."

(Page 15:)

"And now, May 9th, 1919, exceptions to the findings of fact, conclusions of law and entry of judgment are overruled and a new trial is refused.

"BY THE COURT.

"Eo die exception noted and bill sealed.

"HENRY G. WASSON, [SEAL.]  
"Judge."

18 Fourth. The Court below erred in overruling plaintiff's fourth exception to the findings of fact and conclusions of law as follows (Page 14) :

"Fourth. The Court erred in its second conclusion of law as follows:

"2. The adjudication in bankruptcy, in the absence of actual notice of an adverse claim, created no liability on the part of the defendant to the plaintiff."

(Page 15:)

"And now, May 9th, 1919, exceptions to the findings of fact, conclusions of law and entry of judgment are overruled and a new trial is refused.

"BY THE COURT.

"Eo die exception noted and bill sealed.

"HENRY G. WASSON, [SEAL.]  
"Judge."

Fifth. The Court below erred in overruling plaintiff's fifth exception to the findings of fact and conclusions of law as follows (Page 14) :

"Fifth. The Court erred in its third conclusion of law as follows:

"3. Judgment should be entered for the defendant."

(Page 15:)

"And now, May 9th, 1919, exceptions to the findings of fact, conclusions of law and entry of judgment are overruled and a new trial is refused.

"BY THE COURT.

"Eo die exception noted and bill sealed.

"HENRY G. WASSON, [SEAL.]  
"Judge."

19-34 Sixth. The Court below erred in overruling plaintiff's sixth exception to the findings of fact and conclusions of law as follows (Page 14) :

"Sixth. The Court erred in entering the following judgment:

"And now, December 31st, 1918, in accordance with the foregoing findings of fact and conclusions of law, judgment is entered in favor of defendant."

(Page 15:)

"And now, May 9th, 1919, exceptions to the findings of fact, conclusions of law and entry of judgment are overruled and a new trial is refused.

"BY THE COURT.

"To die exception noted and bill sealed.

"HENRY G. WASSON, [SEAL.]  
"Judge."

Seventh. The Court below erred in entering judgment as follows (Page 10, 14):

"And now, December 31, 1918, in accordance with the foregoing findings of fact and conclusions of law, judgment is entered in favor of defendant."

"To William B. Kirker, Esq.,

"Prothon-tary.

"Enter judgment for defendant as per order of court.

"RICHARDSON & ROGERS,  
"Attorneys for Defendant."

"May 29, 1919.—Judgment for defendant as per order of court."

\* \* \* \* \*

## APPENDIX.

In the Court of Common Pleas of Allegheny County, Pa.

No. 1188, July Term, 1915.

Docket —.

ELLIOTT FREDERICK, Trustee in Bankruptcy of the Estate of John E. Schmidt.

vs.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA.

*Præcipe for Summons.*

Filed May 11, 1915.

To William B. Kirker, Esq.,  
Prothonotary.

Please issue summons in assumpst. Returnable the first Monday of June next.

ALPERN & SEDER,  
303 Farmers Bank Building.

L. C. BARTON,  
462 Frick Annex,  
*Attorneys for Plaintiff.*

*Statement.*

Filed May 11, 1915.

ALLEGHENY COUNTY, ss:

The Fidelity Mutual Life Insurance Company, of Philadelphia, a corporation under the laws of the State of Pennsylvania, defendant, is justly and legally indebted to Elliott Frederick, Trustee in Bankruptcy of the Estate of John E. Schmidt, in the sum of one thousand (\$1,000.00) dollars with interest from the 4th day of April, 1913, upon a cause of action as follows:

That on the 19th day of December, 1912, a petition in involuntary bankruptcy was filed against John E. Schmidt, in the District Court of the United States for the Western District of Pennsylvania, at No. 6,572 in Bankruptcy, and subsequently, to-wit, on the 8th day of January, 1913, the said John E. Schmidt was duly adjudged a bankrupt, and thereupon the plaintiff was duly elected his trustee in bankruptcy, gave bond and was duly qualified as required by the provisions of the Bankrupt Act, and he is now so acting.

That among the assets of said estate and which should have come into the possession of plaintiff was a certain policy of life insurance issued by defendant company on the life of said John E. Schmidt, being policy number 132,520, dated September 20, 1902, in the sum of \$1,000.00. That plaintiff cannot attach a copy hereto for the reason that the same was delivered, without any legal authority, to the defendant company by the wife of said bankrupt and is now in its custody, possession and control. In said policy said John E. Schmidt was named as the insured, and Annie M. Schmidt, his wife, as beneficiary, with right of revocation as by provision therein as follows:

"The insured, with the written approval of the President or Vice-President, may upon the surrender of this policy, change the beneficiary, or with such approval it may be assigned."

That said John E. Schmidt died on April 4, 1913, and thereupon the proceeds of said policy became to plaintiff, as trustee, as aforesaid, the title to said policy and right to said proceeds having passed to him by reason of the said proceedings in bankruptcy.

That proof of the death of said insured was duly executed, delivered to said defendant company and by it accepted, thereby the proceeds thereof became due and payable to plaintiff.

That although under the provisions of the Bankrupt Laws of the United States in force at all the times mentioned herein, said policy passed to plaintiff as trustee as aforesaid, the said defendant has neglected and refused to pay to him the proceeds thereof although due and payable.

ALPERN & SEDER,

L. C. BARTON,

*Attorneys for Plaintiff.*

ALLEGHENY COUNTY, ss:

Elliott Frederick, above named plaintiff, appears, makes oath and says that he has read the foregoing statement, and that the matters therein set forth so far as the same are of his own knowledge are true and so far as derived from information and belief the same he believes to — true.

ELLIOTT FREDERICK.

38      Subscribed and sworn before me this 10th day of May,  
1915.

A. C. ELLIS,

*Notary Public.*

My commission expires February 21, 1919.

*Demurrer.*

Filed June 18, 1915.

And now, comes the defendant company, and by its attorneys, demurs to the statement of claim filed in the above entitled case, for the following reasons:

(1) The statement of claim discloses no title in the plaintiff to the policy of insurance therein mentioned.

(2) The statement of claim discloses no right in the Trustee to collect any portion of the proceeds of the said policy.

(3) The statement of claim contains no averments of fact which render the defendant company liable to the plaintiff in the sum claimed, or any part thereof.

JOHN C. SLACK,  
RICHARDSON & ROGERS,  
*Attorneys for Defendant*

39

*Amended Statement.*

Filed March 29, 1917.

ALLEGHENY COUNTY, ss:

First. The Fidelity Mutual Life Insurance Company of Philadelphia, a corporation under the laws of the State of Pennsylvania, is justly and legally indebted to Elliott Frederick, Trustee in Bankruptcy of the estate of John E. Schmidt, in the sum of one thousand (\$1,000.00) dollars, with interest from the 4th day of April, 1913, upon a cause of action as follows:

Second. That on the 19th day of December, 1912, a petition in involuntary bankruptcy was filed against John E. Schmidt in the District Court of the United States for the Western District of Pennsylvania, at No. 6572 in Bankruptcy. Subsequently, to wit, on the 8th day of January, 1913, the said John E. Schmidt was duly adjudged a bankrupt, and afterwards on the 8th day of February, 1913, plaintiff was duly elected his trustee in bankruptcy, gave bond and is now duly acting as such trustee.

Third. That among the assets of said estate at the date of the filing of said petition in bankruptcy and the adjudication thereon was a certain policy of life insurance issued by the defendant company on the life of said John E. Schmidt, said bankrupt, in the sum of one thousand (\$1,000.00) dollars, and dated September 20, 1902, being policy numbered 132520. Said policy being payable as follows:

"The Fidelity Mutual Life Insurance Company of Philadelphia, Penna., by this policy of insurance agrees to pay the sum of  
40      one thousand dollars at its head office in the City of Philadelphia upon surrender of the same properly receipted within sixty days after the acceptance of the due and satisfactory proof of the fact and cause of the death of John E. Schmidt, of Rochester, Beaver County, and State of Pennsylvania, (the insured under this policy) and said claim hereunder to his wife, Annie M. Schmidt, or if the insured survive the aforesaid beneficiary, to the administrators, executors or assigns of the insured, subject to all the



requirements, privileges and provisions stated in the following pages

Plaintiff is unable to attach a copy of said policy for the reason that the same is now in the possession of the defendant.

Fourth. That said policy reserved the right in the insured to change the beneficiary named in said policy, it containing the following provision, to wit:

"The insured, with the written approval of the President or Vice-President, may upon the surrender of this policy, change the beneficiary, or with such approval it may be assigned."

Fifth. That at the date of the filing of said petition in bankruptcy against said John E. Schmidt, and at the time of the adjudication as aforesaid the said policy had a cash surrender value of the sum of \$322.00 payable to the insured, which said sum by reason of said adjudication became vested in the bankrupt estate of said John E. Schmidt, and upon his election and qualification as trustee in plaintiff, as provided by the provisions of the Bankrupt Act of the United States.

41 Sixth. That said John E. Schmidt died on the 4th day of April, 1913, and thereupon the said policy became due and payable to the plaintiff, as trustee, as aforesaid, the title to said policy and the right to the proceeds thereof having passed to him by virtue of the bankruptcy proceedings against the said John E. Schmidt, the insured.

Seventh. That proof of the fact and cause of death of said John E. Schmidt, said insured, was duly executed and delivered to said defendant company and by it accepted, and more than sixty days having elapsed since the acceptance of said proofs the proceeds thereof are now due and payable to plaintiff.

Eighth. That although under the provisions of the Bankrupt Laws of the United States in force at all the times mentioned herein, said policy passed to plaintiff, and after the death of the insured as aforesaid, the proceeds thereof, the said defendant has neglected and refused to pay the same.

L. C. BARTON,  
ALPERN & SEDER,  
*Attorneys for Plaintiff.*

ALLEGHENY COUNTY, ss:

Elliott Frederick, above named plaintiff, appears, makes oath and says, that the matters set forth in the foregoing statement so far as the same are of his own knowledge are true and so far as derived from information and belief the same he believes to be true.

ELLIOTT FREDERICK.

Subscribed and sworn before me this 24th day of March, 1917.

A. C. ELLIS,  
Notary Public.

My commission expires February 21, 1919.

42                    *Notice of Filing Amended Statement.*

Filed March 29, 1917.

To John C. Slack, Esq.,  
Richardson & Rogers, Esqs.,  
Attorneys for Defendant:

You will please take notice that I will on Thursday next, March 29, 1917, at 9:30 o'clock A. M., or as soon thereafter as counsel can be heard move the Court for leave to file the within amended statement.

Respectfully,

L. C. BARTON,  
*Of Counsel for Plaintiff.*

Above notice, with copy of amended statement, served on us this 26th day of March, 1917.

RICHARDSON & ROGERS,  
*Of Counsel for Defendant.*

*Order of the Court.*

Filed March 29, 1919.

And now, to wit, March 29, 1917, the within amended statement presented in open court; and on motion of L. C. Barton, of course for plaintiff, leave is granted plaintiff to file the same.

BY THE COURT.

43                    *Demurrer to Amended Statement.*

Filed March 29, 1917.

And now comes defendant company and, by its attorneys, demurs to the amended statement of claim filed by the plaintiff in the above entitled cause, and assigns the following reasons:

(1) The amended statement of claim discloses no title in the plaintiff to the policy of insurance therein mentioned.

(2) The statement of claim discloses no right in the plaintiff to collect any portion of the proceeds of said policy, nor does the amended statement disclose such right.

(3) The statement of claim does not, nor does the amended statement, contain any averments of fact which render the defendant company liable to the plaintiff in the sum claimed or in any other sum whatsoever.

JOHN C. SLACK,  
RICHARDSON & ROGERS,  
*Attorneys for Defendant.*

*Order Overruling Demurrer.*

Filed July 12, 1918.

And now, July 12, 1918, "demurrer to amended statement" overruled and defendant given twenty days in which to file an affidavit of defense.

BY THE COURT.

*Affidavit of Defence.*

Filed July 26, 1918.

COMMONWEALTH OF PENNSYLVANIA.

*County of Philadelphia, ss:*

Chas. G. Hodge, being duly sworn according to law, deposes and says that he is Secretary of the defendant company, and its duly authorized agent in this behalf, having knowledge of the facts, and that the said defendant company has a full, true, just and legal defence to the whole of the plaintiff's claim, which defence is as follows:

1. The defendant company admits that by its Policy No. 132,520, dated September 20th, 1902, it insured the life of John E. Schmidt, and it attaches hereto and makes part hereof a true copy of the policy of insurance issued to said John E. Schmidt.

2. The defendant company admits that by virtue of a petition filed on the 19th day of December 1912, in the District Court of the United States for the Western District of Pennsylvania, at No. 6572 in Bankruptcy, the said John E. Schmidt was on the 8th day of January, 1913, duly adjudged a bankrupt, and that the plaintiff was regularly elected Trustee in Bankruptcy of the estate of the said John E. Schmidt, and that bond was given and the said Trustee qualified, in accordance with the laws of the United States.

3. The defendant Company admits that the said John E. Schmidt died on the 4th day of April, A. D. 1913.

4. The defendant Company avers that at no time during the life of the said John E. Schmidt was it notified of any claim of the plaintiff to any portion of the surrender value of the said policy, and further avers that at no time prior to the payment of the amount of said policy to the beneficiary named therein, to-wit, Annie M. Schmidt, the wife of said John E. Schmidt, was any notice what-

ever given by the plaintiff, or by any person on his behalf, to the defendant Company, of any claim to the proceeds of said policy, superior to the claim of the beneficiary named in said policy.

5. The defendant Company further avers that on the 7th day of May, A. D. 1913, pursuant to due proofs of death, it paid to the beneficiary named in said policy the sum of One Thousand (\$1,000.00) Dollars, being the proceeds thereof, and on said date received the receipt of the said beneficiary, Annie M. Schmidt, then the widow of said John E. Schmidt, the insured.

6. The defendant Company further avers that the first and only notice it received of any claim of the plaintiff to any portion of the proceeds of the policy, was in the form of a letter from the law firm of Alpern & Seder, dated April 14th, 1914, and received by the defendant Company on April 15th, 1914, which said letter contained no demand for payment to the plaintiff herein.

7. The defendant Company is advised, and believes, and therefore avers, that by virtue of the terms of the policy aforesaid, making the same payable to the wife of the insured, the proceeds of said policy are exempt under the laws of the Commonwealth of Pennsylvania from any claims whatever on the part of the creditors of the said insured.

46        Wherefore the defendant Company denies that it is indebted to the plaintiff in any sum whatsoever.

CHAS. G. HODGE.

Sworn to and subscribed before me this 22nd day of July, 1918.

WM. K. MILLER,

*Notary Public.*

My commission expires March 9, 1919.

*Plea.*

Filed September 9, 1919.

And now comes defendant Company and by its attorneys pleads non assumpsit, payment with leave, etc.

RICHARDSON & ROGERS,

*Attorneys for Defendant.*

*Præcipe for Issue.*

Filed September 9, 1919.

To William B. Kirker,  
Prothonotary:

Put the above entitled cause on the Issue Docket.

L. C. BARTON,

*Attorney for Plaintiff.*

*Stipulation of Counsel as to Offers in Evidence.*

Filed October 8, 1918.

And now, October 8th, 1918, it is hereby stipulated and agreed by counsel in the above action that on the trial of the same before the court without a jury, the said court shall consider as evidence on the part of plaintiff the following:

1. That the items of claim and averments of fact of the affidavit of claim or statement not denied or traversed by the affidavit of defense are to be taken as admitted.

2. That all admissions in the said affidavit of defense are to be taken as and considered as evidence on the part of plaintiff.

3. That it is admitted on the part of the defendant that the plaintiff had no knowledge of the existence of the policy in suit until four months after the death of the insured, and that the said policy was not scheduled in the schedules of bankrupt as filed in the proceedings in bankruptcy.

On the part of defendant:

The fourth, fifth and sixth paragraphs of the affidavit of defense are admitted.

L. C. BARTON,

*Attorney for Plaintiff.*

RICHARDSON & ROGERS,

*Attorneys for Defendant.*

*Stipulations Waiving Jury Trial.*

Dated October 8, 1918.

And now, October 8th, 1918, it is agreed by and between the parties to the above action, that trial by jury be dispensed with and that the above case be tried before a judge of this court, under the Act of Assembly in such case made and provided, the trial judge to enter such judgment as shall be necessary and requisite to enforce his decision under this agreement, subject to appeal, at the option of either party.

L. C. BARTON,

*Attorney for Plaintiff.*

RICHARDSON & ROGERS,

*Attorneys for Defendant.*

*Stipulation Waiving Printing Policy.*

Filed February 20, 1920.

And now, February 17, 1920, it is hereby stipulated and agreed that the printing of the policy of insurance attached to the affidavit of defense in this case, in the Paper Book of Appellant, is hereby waived, as unnecessary to a proper hearing and determination of the case on appeal.

L. C. BARTON,

*Attorney for Plaintiff.*

RICHARDSON &amp; ROGERS,

*Attorneys for Defendant.*

49 *Docket Entries of the Superior Court of Pennsylvania, Fifth District.*

No. 25, April Term, 1920.

ELLIOTT FREDERICK, Trustee in Bankruptcy of the Estate of John E. Schmidt, Appellant,

VS.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY OF  
PHILADELPHIA.

Appeal from Court of Common Pleas of Allegheny County, at No  
1188 of July Term, 1915.

L. C. Barton,

A. Seder,

John C. Slack,

Richardson &amp; Rogers.

Appeal and affidavit filed and Writ exit June 2, 1919.

July 14, 1919, Petition to advance argument filed and sent to Orlady, P. J.

July 15, 1919, Application refused. By the Court.

July 16, 1919, Petition with order of Court endorsed thereon returned from Orlady, P. J.

April 19, 1920, Record and assignments filed.

May 5, 1920, Argued.

July 14, 1920, The judgment is affirmed. Linn, J.

July 19, 1920, Petition for leave to appeal to Supreme Court of Pennsylvania filed.

August 6, 1920, Appeal refused. Per Curiam.

August 9, 1920, Remitted.

August 13, 1920, Præcipe for Supplemental Certiorari Filed.

Ex Die, Supplemental certiorari exit.

Ex Die, Record returned.

20

*Certificate of Record.*

COMMONWEALTH OF PENNSYLVANIA,  
County of Allegheny, ss:

I, Pier Dannels, Prothonotary of the Superior Court of Pennsylvania, for the Fifth District thereof, do hereby certify that the foregoing Record, pages 2-8 to 19 inclusive; 1a to 14a inclusive, is a true and faithful copy of the Record and Proceedings of the Superior Court of Pennsylvania, in the Fifth District aforesaid, in a certain suit therein pending, wherein Elliott Frederick, Trustee in Bankruptcy of Estate of John E. Schmidt, appellant, and The Fidelity Mutual Life Insurance Co. of Phila., appellee.

In testimony whereof, I have herewith set my hand and affixed the Seal of the said the Superior Court of Pennsylvania, in and for the Fifth District, at Pittsburgh, this thirteenth day of August, in the year of our Lord one thousand nine hundred and twenty.

[Seal of the Supreme Court of Pennsylvania.]

PIER DANNAIS,  
Prothonotary.

51 In the Superior Court of Pennsylvania, at Pittsburgh.

No. 25, April Term, 1920.

ELLIOTT FREDERICK, Trustee in Bankruptcy of the Estate of John E. Schmidt, Appellant,

v.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation under the Laws of the State of Pennsylvania.

Appeal from C. P. of Allegheny County.

Filed July 14, 1920.

LINN, J.:

Schmidt's trustee in bankruptcy sued the insurance company to recover the proceeds of a policy of insurance with interest from the date of his death. A jury trial was waived and after a trial by the court, judgment was entered for defendant, and plaintiff has appealed. Without formally amending the pleadings, plaintiff limited his claim to the surrender value of the policy at the date of the adjudication in bankruptcy, and we are asked so to treat the case here. Plaintiff doubtless reached that conclusion after failing in his effort to recover the proceeds of another policy in Frederick.

Trustee, v. Metropolitan Life Insurance Company, 239 Fed. 125, where his averments were substantially the same as here.

Schmidt was adjudicated bankrupt January 8, 1913, and the trustee qualified a month later. Schedules were filed but they did not include this insurance policy. It appeared that the policy was issued September 20, 1902, on the life of Schmidt, in the sum of \$1,000, payable "upon surrender of the (policy) properly receipted within sixty days after the acceptance of the due and satisfactory proof of the fact and cause of the death of Schmidt "and said claim to surrender to his wife, Annie M. Schmidt, or if the insured survive the aforesaid beneficiary, to his administrators, executors or assigns of the insured, subject to all the requirements, privileges and provisions stated in the following pages—" Only parts of the policy are printed in the record. It provided: "The insured, with the written approval of the president or vice president, may upon the surrender of this policy, change the beneficiary, or with such approval it may be assigned."

Schmidt died April 3, 1913. On May 7, 1913, his widow filed the required proofs of death with the insurance company, surrendered the policy properly receipted, and received the proceeds. The company had no notice of the bankruptcy, and no claim to the policy or any part thereof was made by plaintiff until April 14, 1914.

The question now is, can the plaintiff on this record require the insurance company to pay the surrender value which the policy had at the date of adjudication, or at the time of the filing of the petition, when no claim to the policy or any part thereof was made until April 14, 1914, the company meanwhile, on May 7, 1913, having performed its contract in accordance with its terms by paying the beneficiary? Though the terms of the policies are different, the language of the Court of Appeals for this Circuit, in the suit brought by Schmidt's trustee against Metropolitan Life Insurance Co., *supra*, accurately describes the position of the appellee at the time when the beneficiary complied with the requirements of the policy and demanded that the insurance company keep its contract and pay her the proceeds. The Court of Appeals said: "By that contract the company contracted with the insured to pay the amount of the policy to a certain beneficiary. On the death of the insured, without revocation or change of beneficiary, these arose a contractual legal liability of the company to pay the amount of the policy to that beneficiary. As a sequence to such contractual legal liability, the right to sue on the policy was vested in the beneficiary, and the contract provided for no other rights and obligations than those of the beneficiary and the company. When, therefore, the insured had died, and the beneficiary had furnished due proof and made timely demand for the contracted sum, the company, "without notice of any character as to any adverse claim thereto," was not only justified, but contractually bound, to pay the money to Mrs. Schmidt. Having done so, having fulfilled its promises, it was entitled to a surrender of the contract it had fully and in good faith fulfilled. Such being the case, a



is manifest that the trustee has shown no legal right to again collect the whole amount of this policy from the company, and such alleged legal right to collect the whole policy is the demand, and the sole demand, on which he has declared." (A petition for certiorari was denied: 243 U. S. 646.)

The company was obliged by its contract to pay the proceeds to the beneficiary, and having done so, the contract was performed; there can be no further performance; the obligation is ended; and there can be no right in any one to demand the surrender value which was payable only on a contingency which did not and cannot arise, the policy having been surrendered on payment of the proceeds thereof.

But appellant contends that the company should not have paid the beneficiary, and that in some way he ought to recover the surrender value, because under sect. 70a of the Bankruptcy Law certain rights in insurance policies which "any bankrupt shall have" pass to the trustee. We all agree that on the facts contained in this record, the appellant has not shown that any right in this policy passed to him, and the burden of proof was on him. The first and second assignments of error excepting to findings of fact, and so much of the third as complains of the finding of fact made below, are overruled, because those facts were admitted to be true by stipulation signed for that purpose by counsel for appellant. The

54 remaining assignments are to the effect that the court erred in entering judgment for the defendant.

Since appellant's contention under sect. 70a is in the opinion of his counsel most favorably stated in *Cohen v. Samuels*, 245 U. S. 20, we shall quote it from that decision: "The question in the case is the simple one of the construction of sect. 70a. By it the trustee of the bankrupt is vested by operation of law with title to all property of the bankrupt which is not exempt. '(4) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person. \* \* \* (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets.' \* \* \*

"Regarding the section in its entirety there would seem to be no difficulty in its interpretation, but we are admonished by the decision of the Circuit Court of Appeals and its reasoning and also by the argument of counsel that there are considerations which give particular control to the proviso and distinguish between insurance policies and other property which the bankrupt can transfer or

which can be levied upon and sold under judicial process against him (subdivision 5). We have given attention to those considerations and feel their strength, but they are opposed by other considerations. It might indeed be that it would better fulfill the protection of insurance by considering the proviso alone and literally, regarding the policy at the moment of adjudication, and, if it be not payable then in words to the bankrupt—no matter what right

55 or powers are reserved by him, no matter what its pecuniary facility and value is to him—to consider that he has no property in it. But we think such construction is untenable. The declaration of subdivision 3 is that 'powers which he might have exercised for his own benefit' 'shall in turn be vested' in the trustee, and there is vested in him as well all property that the bankrupt could transfer or which by judicial process could be subjected to his debts, and especially as to insurance policies which have a cash surrender value payable to himself, his estate or personal representative. It is true the policies in question here are not so payable, but they can be or could have been so payable at his own will and by simple declaration. Under such conditions to hold that there was nothing of property to vest in a trustee would be to make an insurance policy a shelter for valuable assets and, it might be, a refuge for fraud. And our conclusions would be the same if we regarded the proviso alone."

There are essential differences between the position of the trustee in that case and the position of appellant. There the policies were in the possession of bankrupt and the contest was between him and his trustee. Appellant has not shown that his bankrupt had the policy; it does not appear when his wife obtained it, nor under what circumstances she held it; it is certain that she had it when she surrendered it; the bankrupt may have had the policy at his death, but it is equally true that he may have parted with it long before; that she may have had it for years. The fact cannot be settled by conjecture and there is no presumption aiding appellant. Another important distinction between the two cases is in the requirement of the contract that defendant shall not only have notice of a change of beneficiary, but that such change must be approved by its president or vice president and that a change may only take place "upon the surrender of this policy." The provisions of the policy are not printed in the record. We assume that the officer could not

56 refuse approval without cause, but there was some reason for requiring not only the approval of the officer but also the surrender of the policy when changing the beneficiary; it may have been to enable it to issue a new policy to the new beneficiary, but whatever it was, there was not an absolute right in the bankrupt to make a change, such as was before the court in *Cohen v. Samuels*.

This is a suit to require defendant to perform its contract, i. e. to pay the surrender value thereof, and since appellant is not named as a party in the contract, he must show some privity with a party to whom defendant owed some obligation. Defendant's contract relations were not with the bankrupt alone. In the last analysis, the only facts found below on which appellant bases his right to recover

are that Schmidt became bankrupt, was named as the insured in the policy having a cash surrender value, and that appellant is his trustee; that is not enough.  
The judgment is affirmed.

COMMONWEALTH OF PENNSYLVANIA,  
*County of Allegheny, set:*

I, Pier Dannals, Prothonotary of the Supreme Court of Pennsylvania, sitting at Pittsburgh, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinion in the case of Elliott Frederick Trustee etc. vs. The Fidelity Mutual Life Ins. Company of Phila. at No. 25 April Term, 1920 as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, that the foregoing is a correct transcript from said record and of the whole of the original thereof.

In testimony whereof, I have herunto set my hand and affixed the seal of said Court, at Pittsburgh, in the County of Allegheny, sitting at Pittsburgh, as afore-said, this 11th day of August in the year of our Lord One Thousand Nine Hundred and Twenty.

[Seal of the Superior Court of Pennsylvania.]

PIER DANNALS,

*Prothonotary.*

[Endorsed:] No. —. April Term, 1920. Exemption.

In the Supreme Court of the United States, October Term, 1920.

No. 547.

ELLIOTT FREDERICK, Trustee in Bankruptcy of the Estate of John E. Schmidt, Petitioner,

versus

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation under the Laws of the State of Pennsylvania, Respondent.

*Petitioner's Statement of the Points on Which He Intends to Rely and Stipulation as to Parts of the Record Necessary for the Consideration of the Case.*

Petitioner's Points.

First. That the filing of the petition in bankruptcy against John E. Schmidt and the adjudication thereon, was notice to the respondent of the said bankruptcy proceedings.

Second. That under section 70a, of the Bankruptcy Act, the cash surrender value of a life insurance policy issued by the respondent on the life of said bankrupt, due and payable at the date of the filing of said petition in bankruptcy and of said adjudication, passed to petitioner as assets of the estate of said bankrupt. Said cash surrender value being payable to the insured (the bankrupt). Said policy being payable at the death of the insured to his wife as beneficiary, but if the beneficiary die before the insured then payable to the insured's estate. Said insured (bankrupt) died after the adjudication, and the proceeds of the said policy were paid by respondent to the beneficiary, it alleging that it had no notice of the said bankruptcy proceedings against the insured, at the date the said proceeds were paid. The said policy reserved the right in the insured to change the beneficiary.

Third. That the Court of Common Pleas of Allegheny County, Pennsylvania, and the Superior Court of Pennsylvania, erred in entering judgment for the respondent.

LOWRIE C. BARTON,

*Attorney for Petitioner.*

#### 59 Stipulation as to Parts of Record to be Printed.

And now, November 8, 1920, it is hereby stipulated and agreed that the following parts of the record be printed as necessary for the consideration of this case, to wit:

- |   |  |
|---|--|
| 1. Title of Case, page  | 1 of Transcript of Record.                         |
| 2. Docket Entries, "  | 2-3 " "  |
| 3. Findings of Fact, "  | 8-9-10 " "   |
| 4. Conclusions of Law,  | 10 " "   |
| 5. Judgment,  | 10 " "   |
| 6. Discussion,  | 11-12 " "  |
| 7. Exceptions,  | 13-14 " "  |
| 8. Opinion,   | 15 " "   |
| 9. Exception,   | 15 " "   |
| 10. Judgment,   | 15 " "   |
| 11. Assignments of Error  | 16-17-18-19 Transcript of Record.                  |
| 12. Whole of the Appendix,  | pages 1a to 14a inclusive, Transcript of Record.   |
| 13. Docket Entries in Superior Court and opinion of the said court, | attached to and part of said Transcript of Record. |
| 14. Assignments of Error in this Court.                             |  |
| 15. This Stipulation.   |  |

LOWRIE C. BARTON,

*Attorney for Petitioner.*

W. D. U. ROGERS,

*Of Richardson & Rogers, Attorneys for Respondent.*

petitioner's Statement of Points on Which He Relies and Stipulation as to Parts of the Record to be Printed. Office of the Clerk, Supreme Court, U. S. Received Nov. 10, 1920. Lowrie C. Barton, Attorney and Proctor, Pittsburgh, Pa., Frick Building Annex.

61 [Endorsed:] File No. 27,904. Supreme Court U. S., October Term, 1920. Term No. 547. Elliott Frederick, trustee, petitioner, vs. The Fidelity Mutual Life Insurance Co. Statement of points to be relied upon and designation by petitioner of parts of record to be printed, with consent. Filed Nov. 10, 1920.

62 In the Supreme Court of the United States, October Term, 1920.

No. 547.

ELLIOTT FREDERICK, Trustee in Bankruptcy of the Estate of John E. Schmidt, Petitioner,

versus

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation under the Laws of the State of Pennsylvania, Respondent.

*Assignments of Error and Prayer for Reversal.*

Now comes Elliott Frederick, Trustee in Bankruptcy of the Estate of John E. Schmidt, petitioner, by counsel, and says that there are errors in the records and proceedings of the Superior Court of Pennsylvania in the within entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignments:

The said Superior Court of Pennsylvania erred in affirming the judgment of the Court of Common Pleas of Allegheny County, Pennsylvania, in holding and deciding that petitioner was not entitled to recover the cash surrender value, \$322.00, of the policy of life insurance issued by the defendant (respondent) on the life of John E. Schmidt, as assets of his bankrupt estate, under the provisions of section 70a of the Bankrupt Act of 1898, and the amendments thereto, 30 Statutes at Large 565). And in affirming the ruling and decision of said Court of Common Pleas that the fact of the filing of the petition in bankruptcy against the said John E. Schmidt, and the adjudication thereon, was not notice to the said Fidelity Mutual Life Insurance Company, the respondent, of the said bankruptcy proceedings.

The said errors are more particularly set forth as follows:

The said Superior Court of Pennsylvania erred in ruling, deciding and holding:

First. That the respondent, the Fidelity Mutual Life Insurance Company, had no notice of the bankruptcy proceedings against John E. Schmidt.

Second. In considering and ruling that the case of Frederick, Trustee, vs. Metropolitan Life Insurance Company, 239 Federal Reporter 125, as parallel to, ruling and conclusive in the case at bar.

Third. In its conclusion of law as follows:

"The company was obliged by its contract to pay the proceeds to the beneficiary, and having done so, the contract was performed; there can be no future performance; the obligation is ended; and there can be no right in any one to demand the surrender value which was payable only on a contingency which did not and could not arise, the policy having been surrendered on payment of the proceeds thereof."

Fourth. In its conclusion of law as follows:

"But appellant contends that the company should not have paid the beneficiary, and that in some way he ought to recover the surrender value, because under sect. 70-a of the Bankruptcy Law certain rights in insurance policies which 'any bankrupt shall have' pass to the trustee. We all agree that on the facts contained in this record, the appellant has not shown that any right in this policy passed to him, and the burden was on him."

Fifth. In its conclusion of law as follows:

"The first and second assignments of error excepting to findings of fact, and so much of the third as complains of the findings of fact made below, are overruled."

Sixth. In its rulings in reference to the case of Cohen vs. Samuel, 245 U. S., 50, as follows:

"There are essential differences between the position of the trustee in that case and the position of appellant."

Seventh. In its ruling as follows:

"Appellant has not shown that his bankrupt had the policy; it does not appear when his wife obtained it, nor under what circumstances she held it; it is certain that she had it when she surrendered it; the bankrupt may have had the policy at his death, but it is equally true that he may have parted with it long before; that he may have had it for years. The fact cannot be settled by conjecture and there is no presumption aiding appellant."

Eighth. In its conclusion of law as follows:

"This is a suit to require defendant to perform its contract, i. e. pay the surrender value thereof, and since appellant is not named as a party in the contract, he must show privity with a party to whom defendant owed some obligation. Defendant's contract relations were not with the bankrupt alone. In the last analysis, the only fact found below on which appellant bases his right to recover are that Schmidt become bankrupt, was named as the insured in the policy having a cash surrender value, and that appellant is his trustee; that is not enough."

Ninth. In entering the judgment of July 14th 1920, as follows:

"The judgment is affirmed."

For which errors the petitioner prays that the said judgment of the Superior Court of Pennsylvania, dated July 14th 1920, be reversed, and a judgment be entered for petitioner.

LOWRIE C. BARTON,  
*Attorney for Petitioner.*

Copy of the within assignments of error served on as this 8 day of November 1920.

W. D. N. ROGERS,  
*Of Richardson & Rogers, Attorneys for Respondent.*

[Endorsed:] 547—27904. File No. 27904. No. 547, October Term, 1920. United States Supreme Court. Elliott Frederick, Trustee, vs. The Fidelity Mutual Life Insurance Company. Assignments of Error. Lowrie C. Barton, Attorney and Proctor, Pittsburgh, Pa., Frick Building Annex.

[Endorsed:] File No. 27904. Supreme Court U. S., October Term, 1920. Term No. 547. Elliott Frederick, trustee, petitioner, vs. The Fidelity Mutual Life Insurance Co. Assignments of Error. Filed Nov. 10, 1920.

67 In the Superior Court of Pennsylvania, in and for the Western District, April Term, 1920.

No. 25.

Appeal from the Court of Common Pleas for the County of Allegheny, July Term, 1915.

No. 1188.

ELLIOTT FREDERICK, Trustee in Bankruptcy of the Estate of John E. Schmidt, Appellant,

vs.

FIDELITY MUTUAL LIFE INSURANCE COMPANY of Philadelphia, Appellee.

*Stipulation as to Transcript of Record to be Sent to Supreme Court of the United States.*

And now, October 28th, 1920, it is hereby stipulated and agreed that the certified transcript of record in the above case now on file in the Clerk's Office of the Supreme Court of the United States, be taken as a return to the Writ of Certiorari issued by the Supreme Court of the United States, and that the Prothonotary of the Superior Court of Pennsylvania make return accordingly.

LOWRIE C. BARTON,

*Attorney for Appellant.*

RICHARDSON & ROGERS,

*Attorney for Appellee.*

Certified from the record.

In testimony whereof, I have hereunto set my hand and the seal of said Court, at Pittsburgh, this sixth day of November, 1920.

[Seal of the Superior Court of Pennsylvania.]

PIER DANNALS,

*Prothonotary.*

68 [Endorsed:] No. 25, April Term, 1920. Superior Court. Elliott Frederick, trustee in bankruptcy of the estate of John E. Schmidt, appellant, vs. Fidelity Mutual Life Ins. Co. of Philadelphia. Certified copy of record.

69 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Superior Court of the State of Pennsylvania, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Elliott Frederick, Trustee in Bankruptcy of the Estate of



John E. Schmidt, is appellant, and The Fidelity Mutual Life Insurance Company of Philadelphia is appellee, No. 26, April Term, 1920, which suit was removed into the said Superior Court by virtue of a writ of certiorari to the Court of Common Pleas of Allegheny County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Superior Court and removed into the Supreme Court of the

United States. Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-seventh day of October, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,

*Clerk of the Supreme Court of the United States.*

[Endorsed:] File No. 27,904. Supreme Court of the United States, No. 547, October Term, 1920. Elliott Frederick, Trustee in Bankruptcy, etc., vs. The Fidelity Mutual Life Insurance Company of Philadelphia. Writ of Certiorari.

UNITED STATES OF AMERICA.

*Superior Court of Pennsylvania, ex:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Superior Court of Pennsylvania, in the City of Pittsburgh, this November 6th, 1920.

[Seal of the Superior Court of Pennsylvania.]

PIER DANNALS.

*Prothonotary Superior Court of Pennsylvania.*

[Endorsed:] 547—27904. File No. 27,904. United States Supreme Court, No. 547, October Term, 1920. Elliott Frederick, Trustee in Bankruptcy etc., vs. The Fidelity Mutual Life Insurance Company of Philadelphia. Return of Prothonotary of the Superior Court of Pennsylvania to Writ of Certiorari. Lowrie C. Barton, Attorney and Proctor, Pittsburgh, Pa., Frick Building Annex.

[Endorsed:] File No. 27,904. Supreme Court U. S., October Term, 1920. Term No. 547. Elliott Frederick, Trustee etc., Petitioner, vs. Fidelity Mutual Life Insurance Co. Writ of certiorari and return. Filed Nov. 10, 1920.



No. 547

SEP 16 1920

JAMES D. MAHER,  
CLERK

IN THE  
**Supreme Court of the United States**

No. OCTOBER TERM, 1920.

ELLIOTT FREDERICK, Trustee in Bankruptcy of the Es-  
tate of John E. Schmidt, *Petitioner*,

VERSUS

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY OF  
PHILADELPHIA, a Corporation under the laws of  
the State of Pennsylvania, *Respondent*.

**Motion and Petition for Writ of Certiorari to  
the Superior Court of Pennsylvania, and  
Brief Ex-Parte Petitioner.**

LOWRIE C. BARTON,  
Attorney for Petitioner.

364 Frick Annex, Pittsburgh, Pa.

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IN THE  
SUPREME COURT OF THE UNITED STATES.

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No.....October Term, 1920.

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ELLIOTT FREDERICK, Trustee in Bankruptcy of the Estate of John E. Schmidt, *Petitioner*,

versus

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation under the laws of the State of Pennsylvania, *Respondent*.

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MOTION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

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And now, October 4th, 1920, comes Elliott Frederick, Trustee in Bankruptcy of the Estate of John E. Schmidt, Petitioner, by Lowrie C. Barton, his counsel, and moves this Honorable Court that it shall by *certiorari* or other process directed to the Honorable, the Judges of the Superior Court of Pennsylvania, require the said Superior Court of Pennsylvania to certify to this Court for its review and determination a certain cause in said Superior Court of Pennsylvania lately depending, wherein the petitioner, Elliott Frederick, Trustee in Bankruptcy of the Estate of John E. Schmidt, is the appellant, and the Fidelity Mutual Life

Insurance Company of Philadelphia, a corporation under the laws of the State of Pennsylvania, is appellee, and to that end he now tenders herewith his petition and brief with a certified copy of the entire record in said case in said Superior Court of Pennsylvania.

LOWRIE C. BARTON,  
*Attorney for Petitioner.*

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*To the Honorable, the Chief Justice and Justices of  
the Supreme Court of the United States:*

The petition of Elliott Frederick, Trustee in Bankruptcy of the estate of John E. Schmidt, respectfully represents:

That on the 20th day of September, 1902, the Fidelity Mutual Life Insurance Company of Philadelphia, a corporation under the laws of the State of Pennsylvania, issued its certain policy of life insurance, No. 132,520, in the sum of one thousand dollars, on the life of John E. Schmidt.

That said policy is payable as follows:

"The Fidelity Mutual Life Insurance Company of Philadelphia, Penna., by this policy of insurance agrees to pay the sum of one thousand dollars at its head office in the City of Philadelphia upon surrender of the same properly receipted within sixty days after the acceptance of the due and satisfactory proof of the fact and cause of the death of John E. Schmidt, of Roches-

ter, Beaver County and State of Pennsylvania, (the insured under this policy) and said claim hereunder to his wife, Annie M. Schmidt, or if the insured survive the aforesaid beneficiary, to his administrators, executors or assigns of the insured, subject to all the requirements, privileges and provisions in the following pages • • • "

That said policy reserves the right on the part of the insured to change the beneficiary as follows:

"The insured, with the written approval of the President or Vice-President, may upon the surrender of this policy, change the beneficiary, or with such approval it may be assigned."

That on the 19th day of December, 1912, a petition in involuntary bankruptcy was filed against the said John E. Schmidt in the District Court of the United States for the Western District of Pennsylvania at No. 8572 in Bankruptcy, and on the 8th day of January following he was duly adjudged a bankrupt. On the 8th day of February, 1913, the petitioner was duly elected his trustee and duly qualified.

That said policy of insurance was not included in the schedule which the said bankrupt was required to and did file in the bankruptcy proceedings.

That on the 4th day of April, 1913, the said John E. Schmidt, said bankrupt, died and thereupon proof of the fact and the cause of his death were duly made to and accepted by the said Fidelity Mutual Life Insurance Company, and it, on the 7th day of May, 1913, paid to Annie M. Schmidt, the beneficiary named in the

policy, the sum of one thousand dollars, being the proceeds thereof, and received her receipt.

That petitioner had no knowledge of the issuance of said policy until about four months after the said proceeds had been paid.

That on day of the adjudication of the said John E. Schmidt in bankruptcy, the said policy had a cash surrender value of three hundred and twenty-two (\$322.00) dollars, payable to the insured.

That on the 11th day of May, 1915, petitioner brought an action in assumpsit in the Court of Common Pleas of Allegheny County, Pennsylvania, at No. 1188 July Term, 1915, Docket "D", to recover the proceeds of said policy on the ground that the same became an asset of the estate of the said bankrupt which on the said adjudication vested in petitioner under the provisions of section 70a of the Bankrupt Act of 1898, and amendments thereto, (Chapter 541, 30 Statutes at Large, 544) as follows:

"The trustee of the estate of a bankrupt, upon his appointment or qualification, and his successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudicated a bankrupt, except so far as it is to property which is exempt, to all.

(3) Powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person;



(5) Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him;

Provided, That where a bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets  
• • • .”

That said proceedings in said Court of Common Pleas were afterwards amended so that petitioner claimed and sought to recover the cash surrender value only of said policy, and this is what was claimed in the State courts and is here claimed.

That said cause in the said Court of Common Pleas came on for trial before the Honorable Henry G. Wasson, without a jury, under a stipulation duly entered into under the laws of said State of Pennsylvania, and on the 31st day of December, 1918, said court directed that judgment be entered in favor of the defendant, the Fidelity Mutual Life Insurance Company upon the findings of fact as hereinbefore stated and this additional finding, to-wit:

“(10) Neither at the time the proceeds of said policy were paid nor at any time prior there-

to did the defendant have any knowledge of the adjudication in bankruptcy, nor did the plaintiff give the defendant any notice that he would claim the whole or any part of said policy."

And upon said finding of fact the said court concluded as matters of law as follows:

"(1) The defendant, in good faith, without knowledge of the adjudication in bankruptcy and in the absence of any adverse claim, paid the proceeds of the policy in strict accordance with the terms of the contract, and cannot again be required to make payment of the same or any part thereof.

(2) The adjudication in bankruptcy, in the absence of actual notice of an adverse claim, created no liability on the part of the defendant to the plaintiff.

(3) Judgment should be entered for the defendant."

Whereupon on the 29th day of May, 1919, judgment was duly entered for the defendant, from which judgment your petitioner on the 2d day of June, 1919, appealed to the Superior Court of Pennsylvania, at No. 25 of April Term, 1920.

That afterwards on the 14th day of July, 1920, the said Superior Court of Pennsylvania affirmed said judgment of the said Court of Common Pleas of Allegheny County, Pennsylvania. That on the 20th day of July, 1920, petitioner presented his petition to the Supreme Court of Pennsylvania, praying for an appeal from the said judgment of the said Superior Court of

Pennsylvania, and on the 6th day of August, 1920, said Supreme Court of Pennsylvania refused an appeal, whereupon the said judgment of the said Superior Court of Pennsylvania became final and conclusive and a judgment of the highest court of said State of Pennsylvania, in which a decision could be had.

Your petition respectfully submits that this case comes directly within the provisions of section 237 of the Judicial Code, as amended by the Act of September 6th, 1916, ch. 448, Section 2, 39 Stat. L., 726, as follows:

"It shall be competent for the Supreme Court, by *certiorari* or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment of decree has been rendered or passed by the highest court of a State in which a decision could be had, \* \* \* ; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under the Constitution, treaty, statute, commission, or authority."

Your petitioner distinctly setting up and claiming a title and right to the said cash surrender value of the said life insurance policy under Article 1, Sec-

tion 8, Clause 4, of the Constitution of the United States as follows:

"The congress shall have power, \* \* \* To establish an uniform Rule of Naturalization, and uniform laws on the subject of Bankruptcy throughout the United States."

and under said section 70a of the said Bankrupt Act of 1898, and its amendments as hereinbefore quoted, and the decision of the said State courts being against your petitioner's title and right.

That your petitioner respectfully avers that the said decision and judgment of the State courts is directly contrary to the rulings of this Court in regard to the filing of a petition in bankruptcy as to notice as follows:

"The filing of a petition in bankruptcy was a *caveat* to all the world. It was in effect an attachment and injunction."

*Bank vs. Sherman*, 101 U. S., 403, 406.

*Mueller vs. Nugent*, 184 Ibid., 1, 14.

*Whitney vs. Wernman*, 198 Ibid., 539, 552.

*Robertson vs. Howard*, 229 Ibid., 254.

*Cameron vs. U. S.*, 231 Ibid., 710, 717.

*Acme Harvester Co. vs. Beekman*, 222 Ibid., 303, 306.

*Lazarus vs. Prentice*, 234 Ibid., 263, 266.

*Bailey vs. Ice Machine Co.*, 239 Ibid., 268, 275.

And directly contrary to the rulings of this Court as to the title and right to the cash surrender value of

a life insurance policy in case of bankruptcy as follows:

"A policy of insurance held by a bankrupt, which has a cash surrender value at the time of the adjudication, becomes an asset to the extent of such value in the trustee, under section 70a of the Bankruptcy Act, even when the policy is payable to a beneficiary other than the bankrupt, his estate or personal representatives, if the bankrupt has reserved absolute power to change the beneficiary."

*Cohen, Trustee, vs. Samuels*, 245 U. S., 50.

*Cohn vs. Malone, Trustee*, 248 U. S., 450.

That your petitioner respectfully avers that the said judgment of the Superior Court of Pennsylvania is erroneous and contrary to the provisions of the Bankruptcy Laws of the United States now in force as construed and passed upon by this Honorable Court.

And your petitioner particularly respectfully avers that the Superior Court of Pennsylvania grievously erred in holding that it was necessary for your petitioner to show that at the time of the filing of the petition in bankruptcy and the adjudication, that the bankrupt had the actual physical possession of the policy as follows: (Page 22a, Record.)

"Appellant has not shown that his bankrupt had the policy; it does not appear when his wife obtained it, nor under what circumstances she held it; it is certain that she had it when she surrendered it; the bankrupt may have had the policy at his death, but it is equally true that he may

have parted with it long before; that she may have had it for years. The fact cannot be settled by conjecture and there is no presumption aiding appellant."

Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court, and directed to the Superior Court of Pennsylvania, commanding the said court to certify and send to this Court, on a day certain to be designated, a full and complete transcript of the record and proceedings in the said Superior Court of Pennsylvania, in the said case therein, entitled "Elliott Frederick, Trustee in Bankruptcy of the Estate of John E. Schmidt, Appellant, versus The Fidelity Mutual Life Insurance Company of Philadelphia, a corporation under the laws of the State of Pennsylvania, at No. 25 of April Term, 1920, to the end that the said case may be reviewed and determined by this Court, or that your petitioner have such other or further relief or remedy in the premises as to this Court may seem appropriate and meet, and that the judgment of the said Superior Court of Pennsylvania in this case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

ELLIOTT FREDERICK,  
*Trustee in Bankruptcy of the Estate of John E.  
Schmidt.*

LOWRIE C. BARTON,  
*His Attorney.*

*United States of America,*  
*Western District of Pennsylvania,* } *as:*

Lowrie C. Barton, being duly sworn, says that he is attorney for Elliott Frederick, Trustee in bankruptcy of the estate of John E. Schmidt, that he prepared the foregoing petition, and that the allegations thereof are true, as he verily believes.

LOWRIE C. BARTON.

Subscribed and sworn before me this 27th day of August, 1920.

B. D. GAMBLE,  
*Deputy Clerk United States District Court, Western District of Pennsylvania.*

(Seal of Court)

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**BRIEF.**

We respectfully request this Court to consider as our brief our argument in the Superior Court of Pennsylvania as appears in Paper Book of Appellant in that court at pages 20 to 34 inclusive, herewith submitted, supplemented as follows:

The Superior Court affirmed the judgment of the Court of Common Pleas principally on the ground that the cash surrender of the policy did not pass to the trustee and become an asset of the estate on the adjudication of the Bankrupt, although the Common Pleas found as a fact (page 9, Record):

"(9) On the day of the adjudication in bankruptcy the said policy had a cash surrender value of \$322.00, payable to the insured,"

and no exception was taken to this finding, and there can be no question but that under the terms of the policy, in fact it shows on its face, that the bankrupt reserved and had the absolute power to change the beneficiary. It is true that the Superior Court says (page 22a, Record):

"Another important distinction between the two cases (referring to *Cohen, Trustee, vs. Samuels*, 245 U. S., 50, and this case) is in the requirement of the contract that defendant shall not only have notice of a change of beneficiary, but that such change must be approved by its president or vice-president and that a change may only take place 'upon a surrender of this policy.' \* \* \* We assume that the officer could not refuse approval without cause, but there was some reason



for requiring not only the approval of the officer but also the surrender of the policy when changing the beneficiary, but whatever it was, there was not an absolute right in the bankrupt to make a change, such as was before the court in *Cohen vs. Samuels*

- This is surely error for the question as to the approval of the change of beneficiary and necessity for surrender of the policy does not enter into this case, it being admitted that the insured had the absolute right to change the beneficiary. The amended statement alleges (page 6a Record) :

"Fourth. That said policy reserved the right to the insured to change the beneficiary named in the policy • • •."

The affidavit of defense (page 10a Record) in no manner denies this. On the trial of this case in the Common Pleas Court and on the hearing before the Superior Court the evidence was submitted by stipulation of counsel as permitted by the practice of said courts, and said stipulation distinctly provides (page 13a, Record) :

"1. That the items of claim and averments of fact of the affidavit of claim or statement not denied or traversed by the affidavit of defense are to be taken as admitted."

Wherefore, this clearly admits the absolute right of insured to change beneficiary.

This ruling is contradictory for the Superior Court says that "We assume that the officer could not

refuse without cause." The duty of the officer was only ministerial and he could not refuse to approve, and what possible reason could he have for not approving a change in the beneficiary? The same paragraph of the policy provides (page 9, Record) :

" \* \* \* or with such approval it may be assigned."

Can it be contended for one instant that the officers could refuse to approve an assignment of the policy? The same construction will apply to the whole paragraph. The Superior Court says there must be some reason for requiring "not only the approval of the officer but also the surrender of the policy when changing the beneficiary." Of course there was and the reason is that approval was required so that the company could keep track of the policy and its surrender was required. We submit that such surrender does not mean the delivering up of the policy to the company for cancellation, but means for its surrender for endorsement as to the change of the beneficiary. These were the reasons for its approval and surrender.

This question of the assent of the insurer was before this Court in *Cohn vs. Malone, Trustee, supra* (248 U. S., 450), in construing section 2498 of the Georgia Code of 1910. This Court saying: (Italics ours.)

"Section 2498 of the Georgia Code, 1910, providing that an insured may assign his life insurance policy by directing payment to his personal representative, or to his widow, or to his children, or to his assignee, and that no other person can defeat such direction *when assented to by the insurer*, does not operate to withdraw the cash sur-

render value from his estate in bankruptcy where the assignment was made to his wife expressly subject to his right to change the beneficiaries or surrender the policy at any time."

In the case at bar it was admitted that the bankrupt had the absolute right to have the cash surrender value of the policy on the date of his adjudication and that the insurer was bound to pay it to him. So the Superior Court entirely overlooked such admissions and the evidence before it as presented in the Common Pleas Court.

The Superior Court also ruled (page 22a, Record):

"Appellant has not shown that his bankrupt had the policy; it does not appear when his wife obtained it, nor under what circumstances she held it; it is certain that she had it when she surrendered it; the bankrupt may have had the policy at his death, but it is equally true that he may have parted with it long before; that he may have had it for years. The fact cannot be settled by conjecture and there is no presumption aiding appellant."

The Superior Court overlooked the undisputed fact and finding of the Court of Common Pleas that at the date of the adjudication, the policy had a *cash surrender value of \$322.00 payable to the insured*, (the bankrupt). Further this ruling is in effect that the mere possession of the policy by the wife was conclusive of her ownership. The Superior Court says there is no presumption aiding petitioner, but he must prove that the bankrupt had the policy. Admitting this to

be true, what better or stronger evidence could the petitioner have offered than he did? His amended statement distinctly alleges (page 6a, Record):

"Fifth. That at the date of the filing of the said petition in bankruptcy against the said John E. Schmidt, and at the time of the adjudication as aforesaid the said policy had a cash surrender value of the sum of \$322.00 payable to the insured, which said sum by reason of said adjudication became vested in the bankrupt estate of said John E. Schmidt, and upon his election and qualification as trustee in plaintiff, as provided by the provisions of the Bankrupt Act of the United States."

Nowhere in the affidavit of defense (page 10a, Record) can be found any denial or traverse of said claim, therefore under the stipulation as to the evidence to be considered by the court (page 13a, Record) these matters are admitted, and this question was not before the court, nor does it enter into this case in any manner, consequently this case in every particular is within the rulings of this Court in *Cohen, Trustee, vs. Samuels* and *Cohn vs. Malone, Trustee, supra*, and the said findings and rulings of the State courts are directly in conflict therewith, and this argument as to the physical possession of the policy is merely an attempt by the Superior Court to overcome the effect of said rulings.

Wherefore it being admitted that at the time of the adjudication this policy had a cash surrender value of \$322.00 payable to the insured, which had vested in the bankrupt estate, and in petitioner on his qualification, what does it matter who had the actual physical

possession of the policy? And we further submit that nowhere in the affidavit of defense or in the pleadings does the Insurance Company raise any question as to the possession of the policy. Nor was such matter raised in the Superior Court. Consequently this ruling of the Superior Court being directly contrary to the rulings of this Court as to petitioner's right and title to this cash surrender value, we respectfully submit this Honorable Court should interfere by *certiorari* or other process so as to protect petitioner in his Constitutional rights, as well as to inform others of the standing of trustees in bankruptcy as to the matters raised in this case.

Respectfully submitted,

LOWRIE C. BARTON,  
*Attorney for Petitioner.*